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The Chicago Water Diversion Controversy, II

Herbert H. Naujoks

THE CHICAGO WATER DIVERSION CONTROVERSY*

HERBERT H. NAUJOKS

PART TWO: LEGAL PROBLEMS INVOLVED IN THE CHICAGO WATER DIVERSION CONTROVERSY

(a) *In General*

In the preceding pages the background, history and present status of the Chicago Water Diversion litigation was outlined. In this connection reference was had to various pertinent decisions rendered by the United States Supreme Court. While that court made certain specific rulings concerning many of the legal questions raised in these suits, there still remains unsettled at least one important constitutional question. The following pages contain a discussion of the legal problems involved in this litigation, including an analysis of the legal problem concerning the power or lack of power of Congress to authorize the abstraction or permanent diversion of waters from the Great Lakes watershed to the Mississippi River watershed to the detriment of the Great Lakes system. This problem is of more than mere academic interest because many bills have been introduced in Congress which, if passed, would have purported to authorize diversions of water from the Great Lakes system in excess of the amount fixed by the Supreme Court decree of April 21, 1930. The passage of any such measure by Congress would immediately bring before the United States Supreme Court the question of the constitutionality of such action by Congress, since it is clear that the Lakes states would never admit the validity of such an Act unless the United States Supreme Court first approved of the same.
states.[46]

In the brief filed by the State of Michigan with Hon. Charles Evans Hughes, Special Master, on June 7, 1927, the then Attorney General of Michigan, William W. Potter (later Associate Justice of the Michigan Supreme Court) aptly described the situation with respect to the magnitude and scope of the legal problems as follows:

> "The questions herein are not only far reaching in their material consequences, but their proper solution involves, in the last analysis, the fundamental principles of constitutional government.

*This is the second in a series of three articles on this subject. The first appeared in the December issue of the Review; the last will appear in the May issue.

[46] The Court overruled the motion to dismiss the bill and delayed stating its conclusion as to its jurisdiction until all the facts were before the Court. 270 U. S. 634 (March 22, 1926). On January 14, 1929, ,the Court decided it had jurisdiction to decide the respective rights of the complainant Lake States and Illinois and the Chicago Sanitary District (278 U.S. 367, 409).

> "In the language of Lord Coke in Calvin's case — 'I find, a mere stranger in this case, such a one as the eye of the law (our books and book-cases) never saw, as the ears of the law (our reporters) never heard of, nor the mouth of the law, (for judex est lex loquens) the Judges, our forefathers of the law, never tasted: I say, such a one, as the stomach of the law, our exquisite and perfect record of pleadings, entries, and judgments, (That make equal and true distribution of all cases in question) never digested'."

Special Master Hughes remarked once during the trial, when ruling upon the admissibility of certain evidence, that while the legal questions in the case were complex and manifold, there were nevertheless some matters outside the scope of the issues raised by the pleadings. Mr. Chief Justice Taft, speaking for the Court, likewise noted that "the controversies have taken a wide range."

(b) *The Jurisdiction of the United States Supreme Court to entertain the original suits brought by the Great Lakes States.*

At the very outset in the suits filed by Wisconsin, Michigan, New York, Ohio, Pennsylvania and Minnesota in the Chicago Water Diversion litigation, the Sanitary District of Chicago and the State of Illinois, by demurer and motion, moved to dismiss the original suits filed in the United States Supreme Court by the Great Lakes States on the ground that the controversy involved was not justiciable and hence of a nature not appropriate to the exercise of judicial power. The defendants contended that the controversy was not justiciable because: (1) the bill of complaint asked the Court to regulate navigation — a constitutional function of Congress and not the Court; (2) the United States and other states were indispensable parties; (3) the bill set out neither juridical right nor any injury to the complainant

The constitutional provision involved was Section 2 of Article III of the Constitution of the United States, which provides that:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * Controversies between two or more states; — between a State and Citizens of another State; * * *
>
> "In all Cases * * * in which a State shall be a Party, the Supreme Court shall have original jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The United States Supreme Court has laid down the rule generally with respect to original jurisdiction of actions between states of the Union that wherever a controversy between states is of such

a nature that, if the states were independent and completely sovereign, the controversy would then become the subject of diplomatic representations with the right to resort to force in the event of the failure of diplomatic representations, the case is one which is justifiable in the United States Supreme Court in its original jurisdiction. It is clear that the original jurisdiction of the United States Supreme Court in such matters was intended to take the place of the right of one state of the Union to vindicate its wrongs at the hands of another state by negotiation and force, which rights were surrendered by the states at the adoption of the United States Constitution.

In *Missouri v. Illinois*,[47] the Supreme Court said:

> "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.
>
> "The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi River are not alone concerned, but contagious and typhodial diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi River, including its commercial metropolis, would injuriously affect the entire state.
>
> "That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate disproportionate remedies, requires no argument."

In *Georgia v. Tennessee Copper Co.*[48] the Court said:

> "When the states by their union made the forcible abatement of outside nuissances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court."

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[47] 180 U.S. 208, 241 (1901).
[48] 206 U.S. 230, 237 (1907).

In *North Dakota v. Minnesota,*[49] the court in discussing its original jurisdiction in controversies between states of the Union, said:

> "The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment. They must be suits 'by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and and behind the titles of its citizens, in all the earth and air of its domain'."

In *Kansas v. Colorado,*[50] the court passed upon a demurrer to the complaint charging the state of Colorado with appropriation of waters of an interstate river in violation of the rights of the state of Kansas and its citizens and praying for injunctive relief against such appropriation of waters of the interstate water course. In discussing the justiciable character of that suit at page 140, the courts said:

> "Undoubtedly, as remarked by Mr. Justice Bradley in *Hans v. Louisiana,* 134 U.S. 1, 15, the Constitution made some things justiciable, 'which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution'. And as the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justicable by that instrument."

Again at page 145, it was said:

> "Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.
>
> "We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that, such appropriate decree as the facts might be found to justify, could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential. *Tayloe v .Merchants' Insurance Co.* 9 How. 390,406; Daniell, Ch.Pr. (4th Am. ed.) 380."

The court then took the broad ground that the technicalities of the pleading which obtained in ordinary suits between private parties had no relation to controversies, practically international in

[49] 263 U.S. 365, 373 (1923).
[50] 185 U.S. 125, 140 (1902).

character; stripped the controversy of all technicalities, brushed aside all defects in the bill, and found that since there was a robust controversy between two states, the court would sit as an international tribunal and hear the controversy without even attempting a close analysis of the bill to discover whether or not it contained imperfections or inadequacies of statement. The court further said:[51]

> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this state of the litigation. We think proof should be made as to the * * * circumstances, a variation in which might induce the court to either grant, modify or deny the relief sought or any part thereof."

The amended complaint in the Chicago Diversion controversy related to the equitable use of interstate waters lying partly in the defendant State of Illinois. It related to the alleged right of the State of Illinois to appropriate and abstract the waters of an interstate stream or watercourse to the injury of the complaining states, which are lower riparian states upon such interstate stream or watercourse. Such a claim of right upon the part of the State of Illinois and action on the part of that state in pursuance of such an asserted right to the injury of the various interests of the complaining states in the waters of the interstate stream or watercourse constituting the Great Lakes-St. Lawrence System creates a controversy between the complaining states and the State of Illinois, which, if such states were independent, would give rise to diplomatic negotiation between such states with the right to resort to force in the event of the failure of amicable adjustment.

In *Kansas v. Colorado*,[52] the court pointed out that:

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois, supra, the action of one state reaches through the agency of natural laws, into the territory of another state,

[51] 185 U.S. 125 at p. 146.

[52] 206 U.S. 46, 97-98 (1907);. See also: Pennsylvania v. Wheeling Bridge Co., 13 How. 518 (1851); Wyoming v. Colorado, 259 U. S. 419 (1922); Missouri v. Illinois, 200 U. S. 496 (1906); Hans v. Louisiana, 134 U. S. 1 (1890); So. Carolina v. Georgia, 93 U. S. 4 (1876); New York v. New Jersey, 256 U. S. 296 (1921); Pennsylvania v. West Virginia. 262 U. S. 553 (1923).

> the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in a way as will recognize the equal rights of both and at the same time establish justice between them."

In all of these cases the right of a state to maintain an original suit in the United States Supreme Court upon grounds like or similar to those asserted by the complainants in the Chicago Diversion controversy was sustained by this court.

On the basis of the foregoing cases, the Supreme Court, in considering the Chicago Diversion controversy, brushed aside the objections of the defendants and, in affirming the Special Master's conclusions on the jurisdictional question, ruled that it had jurisdiction to decide the controversy concerning the diversion of the waters of Lake Michigan through the Chicago Drainage Canal.[53] On this point the Special Master's conclusion was:[54]

> "I am unable to conclude that the rights of the complainant states with respect to the diversion at Chicago of the waters of Lake Michigan, directly resulting in an appreciable diminution of the waters of the Great Lakes and connecting channels, to the alleged injury of the commercial and navigation interests of these states and their people, are any less susceptible of judicial determination than the rights of Kansas, Wyoming and North Dakota with respect to the waters of interstate streams."

As has been noted, the United States Supreme Court has repeatedly assumed jurisdiction in original actions brought in that court between states involving the diminution, apportionment, or pollution of interstate waters.[55] Some of these actions were brought by the state to vindicate wrongs suffered as a quasi-sovereign; some suits were brought in a proprietary capacity, and other suits were brought by states as parens patriae, in which the United States Supreme Court assumed original jurisdiction.

In *Georgia v. Tennessee Copper Co.*[56] it was held that the suit was "by a state for an injury to it in its capacity of quasi-sovereign. In that capacity, the state has an interest independent of and behind the title of its citizens, in all the earth and the air within its domain." It is obvious that the same holds true as to water. Clearly the Great Lakes states were authorized to maintain the original actions in the Supreme Court in their quasi-sovereign, as parens patriae, and in a proprietary capacity.

[53] Wisconsin et al. v. Illinois et. al., 278 U. S. 367, 409 (1929).
[54] Report of Special Master Hughes, filed Nov. 23, 1927, at p. 143.
[55] Nebraska v. Wyoming 325 U.S. 589, 610 (1945); Colorado v. Kansas 320 U. S. 383 (1943).
[56] 206 U.S. 230, 237 (1907).

In *Pennsylvania v. West Virginia*,[57] the court pointed out that the withdrawal of natural gas from the interstate stream was "a matter of grave public concern in which the state, as a representative of the public, has an interest apart from that of the individuals affected."

The defendants in the Chicago Diversion controversy originally relied very strongly upon the decisions in *Louisiana v. Texas*[58] and *Hans v. Louisiana*,[59] but neither the Special Master nor the Supreme Court were persuaded by those cases. The United States Supreme Court affirmed the Master's conclusions sustaining the right of the court to assume jurisdiction in the causes in the following language:[60]

> "The pleadings question the jurisdiction of this court and the sufficiency of the facts set forth in the bills to constitute a cause of action. These issues, although raised, are not pressed by the defendants, and we concur with the Master in his conclusion that they are met completely by our previous decisions. *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331, s. c. 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *Sanitary Dist. v. United States*, 266 U. S. 405, 69 L. ed. 352, 45 Sup. Ct. Rep., 176; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552, s. c. 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; *New York v. New Jersey*, 256 U. S. 296, 65 L. ed. 937, 41 Sup. Ct. Rep. 492; *Wyoming v. Colorado*, 259 U. S. 419, 66 L. ed. 999, 42 Sup. Ct. Rep. 552; *North Dakota v. Minnesota*, 263 U. S. 365, 68 L. ed. 342, 44 Sup. Ct. Rep. 138; *Pennsylvania v. West Virginia*, 262 U. S. 553, 623, 67 L. ed. 1117, 1143, 32 A.L.R. 300, 43 Sup. Ct. Rep. 658, 263 U. S. 350, 67 L. ed. 1144, 44 Sup. Ct. Rep. 123; *Georgia v. Tennessee Copper Co.* 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618, 1 Ann. Cas. 488."

It should be emphasized that the Court, in passing upon its jurisdiction to hear and decide an original action between states, determines the question of jurisdiction upon the facts of each individual case. Upon a proper showing the Court will not decline original jurisdiction even though the suit might involve to some extent continuing supervision of the case over a period of years or the exercise of some administrative functions.[61] The true test of original jurisdiction of the Supreme Court in suits between states is whether a genuine controversy of serious and grave importance exists. Diffi-

[57] 262 U. S. 553, at p. 592 (1923).
[58] 176 U. S. 1 (1900).
[59] 134 U. S. 1 (1890).
[60] 278 U. S. 367 at 409 (1929).
[61] Wisconsin v. Illinois, 278 U. S. 367 (1929); 281 U. S. 179 (1930); 289 U. S. 395 (1933); 309 U. S. 569 (1940); 311 U. S. 107 (1940); 313 U. S. 547 (1941); Wyoming v. Colorado, 259 U. S. 419 (1922). See also: Sanitary Dist. v. United States, 266 U. S. 405 (1925).

culties of drafting and enforcing a decree are not justification for the Supreme Court to refuse to perform the important function entrusted to it by the Constitution.[62]

(c) *The legal interest of the intervening Mississippi River States in the Chicago Diversion Controversy.*

During the pendency of the suits filed by the states of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York against the Sanitary District of Chicago and the State of Illinois, four states bordering on the Mississippi River obtained leave and intervened as co-defendants in the suit filed by Wisconsin. These states were Missouri, Kentucky, Tennessee and Louisiana. Subsequently, these river states were joined by the States of Arkansas and Mississippi. While this intervention occurred in the Wisconsin case, the controversy was submitted to the Special Master just as though the intervening River States had been made co-defendants in all three cases.

The River States asserted their legal interest was in maintaining any benefits to Mississippi River navigation obtained through the Chicago diversion.

Concerning the benefit to Mississippi River navigation produced by the diversion, the Special Master reached the following conclusion:[63]

> "My conclusion is that the diversion from Lake Michigan, through the Drainage Canal, increases to some extent, during low water, the navigable depths over bars of the Mississippi River, but that the extent of this increase is not the subject of sufficiently accurate determination to warrant a finding. Upon all the facts it was permissible for the Secretary of War to reach the conclusion that the diversion from Lake Michigan of 8500 c.f.s. was, to some extent, an aid to navigation on the Mississippi River in time of low water. * * * It is not controverted that the Secretary of War had these considerations before him on the application and hearing which resulted in the permit of March 3, 1925."

The Lake States contended the River States have no sufficient legal interest in maintaining a benefit to the Mississippi River produced by the Chicago diversion since this diversion was illegal as based upon a void permit of the Secretary of War. The Supreme Court in touching upon this phase of the controversy held that:[64]

> "The intervening States on the same side with Illinois, in seeking a recognition of asserted rights in the navigation of the Mississippi, have answered denying the rights of the complainants to an injunction. They really seek affirmatively to preserve the diversion from Lake Michigan in the interest of

[62] Nebraska v. Wyoming, 325 U. S. 589, 616-617 (1945).
[63] Report of Special Master Hughes, filed November 23, 1927, p. 124.
[64] 278 U. S. 367 at p. 420 (1929).

such navigation and interstate ocmmerce though they have made no express prayer therefor. In our view of the permit of March 3, 1925, and in the absence of direct authority from Congress for a waterway from Lake Michigan to the Mississippi they show no rightful interest in the maintenance of the diversion. Their motions to dismiss the bills are overruled and so far as their answer may seek affirmative relief, it is denied."

The above ruling of the Supreme Court confirms the suggestion made previously by the same Court in the case of *Sanitary District v. United States*,[65] where the court in discussing the alleged interest of the Mississippi River states in the Chicago water diversion, said:

"The interest that the river states have in increasing the artificial flow from Lake Michigan is not a right, but merely a consideration that they may address to Congress, if they see fit * * *. But we repeat that the Secretary, by his action, took no rights of any kind. He simply refused an application of the Sanitary Board to remove a prohibition that Congress imposed. It is doubtful at least, whether the Secretary was authorized to consider the remote interests of the Mississippi states or the sanitary needs of Chicago."

The decision of the United States Supreme Court that the Mississippi River states who sought to intervene in the Chicago Diversion controversy had no legal standing is manifestly correct since such river states had not and could not show any lawful interest in increased diversion of water in excess of lawfully authorized withdrawals.

(d) *The Right of Illinois to Abstract Huge Quantities of Water from the Great Lakes System Without the Consent of the United States.*

In the suits filed by the Great Lakes States to enjoin the diversion of the waters of the Great Lakes System through the Chicago Drainage Canal, the Special Master in the original reference stated that one of the questions of law was * * * "whether the State of Illinois had the right, as against the complainants, to divert the waters of Lake Michigan in the manner and for the purposes shown, without the consent of the United States; * * *"[66]

The conclusion of the Special Master on this proposition of law was:[67]

"That the State of Illinois and the Sanitary District of Chicago have no authority to make or continue the diversion in question without the consent of the United States."

In the answer filed by the Sanitary District of Chicago (paragraph 14), after stating that the Illinois Act of May 29, 1889 relating to

[65] 266 U. S. 405, 431 (1925).
[66] Report of Special Master Hughes, dated Nov. 23, 1927, p. 140.
[67] Ibid, p. 196.

sanitary districts[68] required a diversion of water from Lake Michigan of about 9876 cubic feet per second for the disposal of sewage, it was said that the Sanitary District "cannot divert said quantity of water, and does not intend to divert said quantity of water except by and with the authority of the United States according to law." The State of Illinois adopted as its own answer the answer of the Sanitary District with the above averment. Under Section 20 of the Act of 1889 the Sanitary District was required to divert 200 cubic feet per minute (or 3-1/3 cubic feet per second) of water from Lake Michigan for each 1000 of population.

In the suit filed against the Sanitary District by the Federal Government,[69] the Sanitary District defended its action in diverting huge quantities of water from Lake Michigan by stating that it was proceeding under an Illinois Act of May 29, 1889 by which it was provided that a channel should be made of a size sufficient to take care of the sewage and drainage of Chicago as the population might require, with a capacity to maintain an ultimate flow of not less than 600,000 cubic feet per minute (or 10,000 cubic feet per second), and a continuous flow of not less than 20,000 cubic feet per minute for each 100,000 of the population within the Sanitary District of Chicago.

The Supreme Court in giving judgment for the United States enjoining a diversion of a greater quantity of water than that authorized by the permit of the United States Secretary of War, said:[70]

> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question but that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants. In matters where the States may act, the action of Congress overrides what they have done. *Monongahela Bridge Co. v. United States,* 216 U. S. 177. *Second Employers' Liability Cases,* 223 U. S. 1, 53. But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all. *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District,* 233 U.S. 75, 79. Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.

It is clear that the foregoing decision in the suit brought by the Federal Government settled authoritatively that neither the Sanitary District of Chicago nor the State of Illinois had the right to divert

[68] Illinois Laws of 1889, page 125.
[69] 266 U. S. 405 (1925).
[70] 266 U. S. 405 at p. 426 (1925).

the waters of the Great Lakes to the detriment of the complainant states, without the consent of the United States. The State of Illinois and the Sanitary District in the suits filed by the Great Lakes States did not argue that Illinois as a sovereign had the right as against complainant states to abstract up to 10,000 cubic second feet of water from Lake Michigan through the Chicago Drainage Canal. They defended their action in withdrawing 8,500 cubic feet per second, plus domestic pumpage (an additional 1700 cubic second feet) by relying on the authority conferred by the Permit of the Secretary of War issued on March 3, 1925. By this defense the Sanitary District and the State of Illinois abandoned any claim that the diversion would be legal without the consent of the Federal Government.

The Supreme Court in the suits filed by the Great Lakes States assumed that as aaginst complainant states the diversion would be unlawful unless Congress under the Constitution had the power to and did directly or through some duly authorized agency or officer give its consent to such diversion. This was in accord with the elementary rule of the common law that a riparian proprietor was entitled to the continued natural flow of a living stream or lake by or through his land without appreciable diminution in quantity or impairment in quality. This common law rule was generally adopted in the United States and obtains in Illinois and in all of the complainant lake states.[71]

The common law rule that an upper riparian state or owner upon an interstate stream or watercourse may not divert or use the waters of that stream within its borders in defiance of the rights of a lower riparian state or owner or without regard to injury to a lower riparian owner has been adopted in its broad sense by the United States Supreme Court.[72]

One of the leading cases on this subject is that of *Wyoming v. Colorado,*[73] wherein Colorado, an upper riparian state, asserted the right to divert and use the waters of an interstate stream or watercourse regardless of the injury such use may cause to a lower

[71] United States v. Rio Grande Dam & Irrigation Co., 174 U.S., 690, 702 (1899); Kimberly & Clark Co. v. Hewitt. 79 Wis. 334, 44 N.W. 303, 337 (1891); Village of Dwight v. Hayes, 150 Ill. 237, 37 N. E. 218 (1894); Minnesota Loan & Tr. Co. v. St. Anthony Falls Water Power Co., 82 Minn. 505. 85 N.W. 520, 523, (1901): Miller v. Miller, 9 Pa. 74, 49 Am. Dec. 545 (1848): Canton v. Shock, 66 Ohio St. 19, 63 N.E. 600 (1902); Stock v. Jefferson, 114 Mich. 357, 72 N.W. 132 (1897): Strobel v. Kerr Salt Co., 164 N.Y.303, 58 N.E. 142 (1900) Burk v. Simonson, 104 Ind. 173, 2 N.E. 309 (1885); Angell, Watercourses, sections 332, 335, 339.

[72] Missouri v. Illinois, 180 U. S. 208 (1901); Nebraska v. Wyoming, 325 U. S. 589 (1945); Kansas v. Colorado, 206 U. S. 46 (1907); Wyoming v. Colorado, 259 U. S. 419 (1922).

[73] 259 U. S. 419 (1922).

riparian state or owner. The Supreme Court flatly rejected this view, saying:[74]

> "The contention of Colorado that she, as a state, rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river, thoroughout its course in both states, is but a single stream wherein each state has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in Kansas v. Colorado, and was adjudged untenable. Further consideration satisfies us that the ruling was right. * * *"

Today it is well settled that an upper riparian owner, whether a state or an individual or corporation, may not appropriate and use the waters of an interstate watercourse to the detriment of the lower riparian state and its citizens. The question then arises as to what rule shall be applied in determining the uses which may be made of an interstate watercourse by the various states bordering thereon in conformity to their respective rights.

In the cases of *Kansas v. Colorado,*[75] and *Wyoming v. Colorado,*[76] the rule was laid down by the United States Supreme Court that in determining the apportionment of the uses of the interstate watercourse by upper and lower riparian states, the Court will take into consideration the law of waters of the respective states. Thus, a lower riparian owner cannot complain if the upper riparian state were permitted to make such uses of the interstate waters as are permitted by the law of waters of the lower riparian state. Accordingly, in *Kansas v. Colorado*[77] the Supreme Court found that the State of Colorado had adopted the appropriation doctrine of water which is common in the arid states located in the western section of our nation and that the State of Kansas by her law of waters recognized the right of riparian owners to a reasonable appropriation of the waters of a stream for irrigation purposes within the basin of the stream. The court then ruled that the State of Kansas could not complain of a reasonable appropriation of the waters of the Arkansas River by the state, or citizens of Colorado for irrigation purposes within the basin of that river.

In the later cases of *Wyoming v. Colorado*[78] the Supreme Court made the finding that both states had adopted the appropriation rule of the law of waters. Accordingly, the court then held that the

[74] 259 U. S. 419 at p. 466 (1922).
[75] 206 U. S. 46 (1907).
[76] 259 U. S. 419 (1922).
[77] 206 U. S. 46 (1907).
[78] 259 U. S. 419 (1922).

rights of Wyoming and Colorado in the interstate watercourse should be determined by the application of the law of waters common to both states. In applying this rule, the court held that the State of Colorado, as an upper riparian owner must recognize the prior applications made in the State of Wyoming in accordance with the rule in force in both states.

The court in these cases recognizes that the most favorable consideration that a state may ask in relation to her rights in an interstate watercourse is the determination of its rights on the basis of its own law of waters. Nothing could be fairer than this. It should be pointed out, however, that it does not follow that where two states have adopted entirely different laws relating to waters either one of them could prejudice the rights of the other state by adopting a law of waters which is not recognized by the other state and which rule of waters would seriously prejudice such other state. The decisions of the United States Supreme Court thus far have merely gone to the extent of holding that the lower riparian state cannot complain if her rights are determined in accordance with her own law of waters.

Turning our attention now, specifically to the Chicago Water Diversion cases, we find that the court applied the common law of waters in determining the rights of Wisconsin, Minnesota, Michigan, New York, Ohio and Pennsylvania, the lower riparian states, and the State of Illinois, the upper riparian state, in the waters of the Great Lakes. The common law of waters is in force in all of the complainant and defendant states. Thus, the Supreme Court correctly used the common law of waters as the proper measure of the rights of the complainant and defendant riparian states.

(e) *Whether Congress has Given Specific Authority for the Chicago Diversion.*

On this point the Special Master stated the issue as follows:[79]

> "If it be assumed that Congress has power to control the diversion, to determine whether and to what extent it should be permitted, the next question is whether it exercised such power, and, first, whether it has exercised it directly."

The contention of Illinois and the Sanitary District was that the Federal Acts of March 30, 1822[80] and of March 2, 1827[81] which provided for a project of a waterway from Lake Michigan to the Mississippi River authorized directly diversion of water from Lake Michigan. They argued that Congress was early and fully advised

[79] Report of Special Master Hughes, dated Nov. 23, 1927, p. 171.
[80] 3 U.S. Stats. at L. 659.
[81] 4 U.S. Stats. at L. 234.

as to the action of Illinois in providing for the construction of a drainage canal by the Sanitary District, the plan to divert water from Lake Michigan for the purpose of the canal and the extent of the diversion contemplated. It was also urged that Congress by improvements in the Illinois River and in the Chicago River sanctioned the diversion since a project depth of seven feet would require a diversion of at least 8500 cubic feet per second and, further, that Congress actively aided in the construction of the Chicago River segment of the Sanitary District's diversion works.

The Acts of 1822 and 1827 were considered by the Supreme Court in *Sanitary District v. United States*,[82] and were found to contain nothing with regard to the amount of water to be withdrawn from the lake, nor did any improvements in the Illinois or Chicago River indicate Congressional approval of the Chicago diversion, the Court saying:

> "The defendant in the first place refers to two acts of Congress: one of March 30, 1822, 3 Stat. 659, which became ineffectual because its conditions were not complied with, and another of March 2, 1827, c/51, 4 Stat. 234, referred to, whether hastily or not, in *Missouri v. Illinois*, 200 U.S. 496, 526, as an act in pursuance of which Illniois brought Chicago into the Mississippi watershed. The act granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Like Michigan, but if it has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain."

On the basis of the Congressional Acts, Reports of the War Department, and the above decision, the Special Master concluded that Congress had not directly authorized the diversion in question.[83]

(f) *Whether the Secretary of War had authority under the Act of March 3, 1899 to regulate the Chicago diversion.*

The lake states contended that Congress had given no authority for the Chicago diversion, even if Congress had such power. The defendants relied for their authority to abstract huge quantities of

[82] 266 U.S. 405, 427-428 (1925).
[83] Report of Special Master Hughes, dated Nov. 23, 1927, p. 196.

water from the Great Lakes-St. Lawrence watershed on the Permit of the Secretary of War, dated March 3, 1925, which was issued pursuant to section 10 of the Act of March 3, 1899.[84] The lake states contended that the Act of March 3, 1899, conferred no power upon the Secretary of War to authorize the diversion of water from Lake Michigan because of the language of that Act which plainly states: "That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any waters of the United States is hereby prohibited." It was argued that this provision clearly provides that there could be no obstruction to the navigable capacity of any waters of the United States without the affirmative authorization of Congress, namely, a general or special act of Congress. It was further contended that other provisions of that statute make no exceptions to the general prohibition contained in the first part of the Act. Thus, under the complainant states construction of that Act it is unlawful to create any obstruction to the navigable capacity of the waters of the United States without specific consent of Congress (which had not been given in this matter) but in addition thereto, the acts enumerated in other parts of section 10 of the Act of March 3, 1899, could not be done without a permit of the Secretary of War, even though such acts do not obstruct the navigable capacity of any waters of the United States. It was also argued that delegation by Congress under the Act of 1899 of power to the Secretary of War to authorize the Chicago diversion would be invalid.

The Special Master disagreed with these contentions of the lake states regarding the construction and validity of the Act of March 3, 1899. The Special Master concluded that the delegation of authority to the Secretary of War was not unlimited. He decided that section 10 of the Act of March 3, 1899, properly construed, conferred authority upon the Secretary of War to determine what is or is not an unreasonable obstruction to the navigable capacity of the waters of the United States under the circumstances of the particular case and that such determination is as immune from judicial review as if Congress had acted directly.[85]

The United States Supreme Court, in considering the validity, scope and application of section 10, of the Rivers & Harbors Act of March 3, 1899, held that the true intent of that Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited and that in the cases described in the second and third clauses of Section 10, the Secretary of War was authorized to determine what in the particular cases constituted an

[84] 30 U. S. Stat. at L. 1151.
[85] Report of Special Master, dated Nov. 23, 1927, pp. 176-191.

unreasonable obstruction. The Court also held this construction of the Act did not constitute an unlawful delegation of legislature power. In discussing the Act the Court said, in part:[88]

> "The policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890, chap. 907, 26 Stat. at L. 454, 455. Sections 9 and 10 were the rearranged result of the provisions of Secs. 7 and 10 of the Act of 1890. A new classification was made in Secs. 9 and 10 of the Act of 1899, and substituted for Sec. 10 of the Act of 1890. The latter provided that the creation of any obstruction to navigable capacity was prohibited, unless 'affirmatively authorized by law,' and this was changed so as to read 'affirmatively authorized by Congress.' The change in the words of the first clause of Sec. 10 was intended to make mere state authorization inadequate. Sanitary Dist. v. United States, 266 U. S. 405, 429, 69 L. ed. 352, 364, 45 Sup. Ct. Rep. 176; United States v. Bellingham Bay Boom Co., 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343. It was not intended to override the authority of the state to put its veto upon the placing of obstructing structures in navigable waters within a state, and both state and Federal approval were made necessary in such case. Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472. The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Sec. 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Sec. 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Sec. 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. The supreme court of Maine, in Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibtion of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.
>
> "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second

[88] Wisconsin et al. v. Illinois et al., 278 U.S. 367, at pp. 412-414 (1929).

and third clauses of Sec. 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction. * * *"

"But it is said the construction thus favored would constitute it a delegation by Congress of legislative power and invalid. We do not think so."

The Court, having decided that the Secretary of War, pursuant to the Act of March 3, 1899, could take some action with regard to diversions of water without any general or special act of Congress on that subject then considered the validity of the Permit issued by the Secretary of War, dated March 3, 1925, authorizing a diversion of 8500 cubic feet per second, in addition to domestic pumpage.

(g) *The Permit of March 3, 1925 as authority for the maintenance of the Chicago diversion.*

The United States Supreme Court, as was observed hereinbefore, in speaking of the Chicago diversion litigation, pointedly remarked that "the controversies have taken a wide range."[87] The legal questions concerning the power of the Court to decide the Chicago Diversion controversy, the right of Illinois to maintain the Chicago diversion without Congressional sanction, the construction and effect of the prohibition contained in the Federal Act of March 3, 1899, chapter 425, of obstructions to the navigable capacity of waters "unless affirmatively authorized by Congress," the necessity of obtaining Congressional approval in every case of such an obstruction, and other questions were interesting and important. Illinois possessed no authority to maintain the diversion without the consent of the United States.[88]

It was decided that the Federal Act of March 3, 1899 did not intend to require a special authorization in every case but that in accordance with other provisions of the Act the Secretary of War was left with authority, acting upon recommendation of the Chief of Engineers, to determine what should be approved and authorized in the class of cases described in the Act.[89] It was further decided that Congress had not affirmatively authorized the Chicago diversion.

Then the Court came to grips with the important question concerning the effect and operation of the Permit of March 3, 1925, as authority for the maintenance of the Chicago diversion.

On this point the Special Master said, in part:[90]

"In considering the validity of the permit of March 3, 1925, the exigency as it then existed must be considered. The prior

[87] Wisconsin et al v. Illinois et al, 278 U.S. 367 at p. 409 (1929).
[88] Sanitary District v. United States, 266 U.S. 405 (1925).
[89] 278 U.S. 367 at pp. 411-415 (1929).
[90] Report of Special Master Hughes, November 3, 1927, pp. 192, 196.

permit limiting the withdrawal to 4167 c.f.s. had been enforced by the Court without prejudice to such action as the Secretary of War might lawfully take. The question as to the validity of the permit of March 3, 1925, is narrowed to the point whether in allowing the increase of the diversion from 4167 c.f.s. to 8500 c.f.s. (both exclusive of Chicago's pumpage, *supra,* pp. 22, 81, 85) the Secretary of War acted arbitrarily and without reasonable relation to the purpose of his delegated authority. There had been, and was, an actual withdrawal of far more than this amount. The total flow through the drainage canal in the year 1924 had been 9465 c.f.s., and, exclusive of Chicago's pumpage 8191 c.f.s. (*supra,* p. 23). In exercising his authority under the statute, it was incumbent upon the Secretary of War to consider the interests of navigation, but he was bound to consider those interests in relation to the Chicago River and the Chicago harbor as well as in connection with the effect on other harbors and the levels of the lakes. * * *

"This permit, like those previously granted, was only a revocable license. (*Sanitary District v. United States,* 266 U. S. 405, 429.) But, as such, the permit was effective. It created no vested right in the Sanitary District. It is at all times subject to review, and the complete control of the diversion remains, as it should remain in view of the national interests involved, with Congress.

"In my opinion, the permit of March 3, 1925, is valid and effective. In this view, it should not be overridden by judicial action."

In his conclusions of law the Special Master held:[91]

"6. That the Permit of March 3, 1925, is valid and effective according to its terms, the entire control of the diversion remaining with Congress."

The Court, in considering the validity of the Secretary of War's Permit of March 3, 1925, said:[92]

"The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversion. This is what the Secretaries of War and the Chiefs of Engineers were trying to do in the interval between 1896 and 1907 and 1913 when the applications for 10,000 cubic feet a second were denied by the successive Secretaries and in 1908 a suit was brought by the United States to enjoin a flow beyond 4,167 cubic feet a second. Then pending the suit, the Sanitary District disobeyed the restriction of the Secretary of War's permit and increased the diversion to 8,500 cubic feet in order to dispose of the sewage of that District. Had an injunction then issued and been enforced, the Port of Chicago almost immediately would have become practically unusable because of the deposit of sewage without a sufficient

[91] Ibid, p. 196.
[92] Wisconsin et al v. Illinois et al, 278 U.S. 396, 420-421 (1929).

flow of water through the Canal to dilute the sewage and carry it away. In the nature of things it was not practicable to stop the deposit without substituting some other means of disposal. This situation gave rise to an exigency which the Secretary, in the interest of navigation and its protection, met by issuing a temporary permit intended to sanction for the time being a sufficient diversion to avoid interference with navigation in the Port of Chicago. See New York v. New Jersey, 256 U. S. 296, 307, 308. The elimination and prevention of this interference was the sole justification for expanding the prior permit, the limitations of which had been disregarded by the Drainage District. Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. He could not make mere local sanitation a basis for a continuing diversion. Accordingly he made the permit of March 3, 1925, both temporary and conditional — temporary in that it was limited in duration and revocable at will, and conditional in that it was made to depend on the adoption and carrying out by the District of other plans for disposing of the sewage.

"It will be perceived that the interference which was the basis of the Secretary's permit, and which the latter was intended to eliminate, resulted directly from the failure of the Drainage District to take care of its sewage in some way other than by promoting or continuing the existing diversion. It may be that some flow from the Lake is necessary to keep up navigation in the Chicago River, which really is part of the Port of Chicago, but that amount is negligible as compared with 8,500 feet per second now being diverted. Hence, beyond that negligible quantity, the validity of the Secretary's permit derives its support entirely from a situation produced by the Sanitary District in violation of the complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river. In these circumstances we think they are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end."

It is plain that the ruling of the Court with respect to the invalidity of the Permit of March 3, 1925, is correct. This construction is consistent with every court ruling theretofore made in the United States construing the effect of such a Permit.[93] These decisions all hold that a Permit of the Secretary of War, similar to the one here involved, constitutes no affirmative authority to invade the property rights of a third party. In the Chicago diversion suits,

[93] Hubbard v. Fort, 188 Fed. 987 (1911); Wilson v. Hudson County Water Co., 76 N.J. Eq. 543, 76 Atl. 560 (1910); New York v. New Jersey, 256 U.S. 296 (1921); Cobb v. Commissioners, 202 Ill. 427 (1903). In re Crawford County Levee & Drainage District, 182 Wis. 404 (1924); Atty. Gen. ex. rel. Becker v. Bay Boom W.R. & F. Co., 172 Wis. 363 (1920).

the action taken by Illinois and the Chicago Sanitary District, namely the diversion of huge quantities of water for sewage disposal, lowered the lake levels and thus decreased the navigable capacity of the Great Lakes with serious injury to the Great Lakes States and their peoples. The Act of 1899 only grants authority to prevent obstructions to navigation and not authority to create such obstructions. The basis of the Permit of March 3, 1925, was the disposition of Chicago's sewage by dilution. Manifestly, the Secretary of War exceeded his authority in this instance and the Permit was illegal and void.[94]

(h) *The Boundary Waters Treaty of January 11, 1909 (Ratified in 1910) as Authority for the Chicago Diversion.*

It has been urged on many occasions that the Boundary Waters Treaty of January 11, 1909 (Ratifications of this treaty were exchanged on May 5, 1910)[95] sanctions a diversion of 10,000 cubic second feet of water from the Great Lakes-St. Lawrence System through the Chicago Drainage Canal, and that this treaty furnishes justification for favorable consideration of legislation to diversion at Chicago of 5,000 to 10,000 cubic second feet of water in addition to domestic pumpage. One of the main objects of this treaty was recited to be the prevention of "disputes regarding the use of boundary waters." A preliminary article defined "boundary waters" as follows:

Preliminary Article

> "For the purpose of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and

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[94] Ase the permit of March 3, 1925 expired prior to the Court's decision of April 14, 1930 on re-reference (281 U.S. 179) a new pedmit was issued by the Secretary of War dated December 31, 1929, authorizing the diversion in addition to pumpage of 7,250 c.f.s. until July 1, 1930, and thereafter 6,500 c.f.s. but limiting the total flow at Lockport, including pumpage, to an average of 8,500 c.f.s. until July 1, 1930; the permit to expire on the effective date of the Supreme Court decree. The decree of the Court was dated April 21, 1930 (281 U.S. 696).
On June 26, 1930 the Secretary of ar issued a permit authorizing diversion of water "as specified in the said decree." The permit provided that the diversion, and the action of the Sanitary District to reduce the discharge, shall be under the supervision of the District Engineer at Chicago, and the diversion "under his direct control in times of flood on the Illinois and Des Plaines Rivers." The present diversion of 1,500 cubic feet per second plus domestic pumpage, is pursuant to a permit authorizing diversion of water "as specified" in the decree of April 21, 1930 (281 U. S. 696).

[95] 36 U.S. Stats at L. 2448.

waterways, or the waters of rivers flowing across the boundary." After this definition, there were the following provisions:

"ARTICLE I. The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

"It is further agreed that so long as this treaty shall remain in force, this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters, and now existing or which may hereafter be constructed on either side of the line. Either of the High Contracting Parties may adopt rules and regulations governing the use of such canals within its own territory and may charge tolls for the use thereof, but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the High Contracting Parties and the ships, vessels, and boats of both of the High Contracting Parties, and they shall be placed on terms of equality in the use thereof.

"ARTICLE II. Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

"It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

"ARTICLE III. It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side

of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

"The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

"ARTICLE IV. The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of a remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level that the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

"It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

The treaty provided that the United States might authorize the the diversion within the State of New York of waters of the Niagara River above the Falls, for power purposes, not exceeding in the aggregate a daily diversion at the rate of 20,000 c.f.s., and that the United Kingdom, by the Dominion of Canada, or the Province of Ontario, might authorize a diversion of said waters, for power purposes, not exceeding a daily diversion at the rate of 36,000 c.f.s. (Art. V).

The International Joint Commission, under the treaty, is composed of six members, three appointed by each Government (Art. VII). It has jurisdiction over and passes upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of the treaty the approval of the Commission is required. The Commission is to be governed by certain declared principles. Each of the High Contracting Parties, on its own side of the boundary, is to have "equal and similar rights in the use of the waters hereinbefore defined as boundary waters."

With reference to the use of boundary waters, it was provided that the following order of precedence should be observed among the various uses enumerated in the treaty for these waters, to-wit: (1) uses for domestic and sanitary purposes; (2) uses for navigation, including the service of canals for the purposes of navigation; (3) uses for power and for irrigation purposes. These provisions were not to "apply to or disturb any existing uses of boundary waters on either side of the boundary" (Art. VIII).

It was agreed that any other questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, should be referred from time to time to the International Joint Commission for examination and report, upon the request of either Government. In such cases the International Joint Commission was authorized to examine into and report upon the facts, with such conclusions and recommendations as might be appropriate, subject to the restrictions or exceptions which might be imposed by the terms of the reference. But such reports should not be regarded as decisions either on the facts or the law and should not have the character of an arbitral award (Art. IX). And it was further agreed that any questions or matters of difference arising between the High Contracting Parties involving rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, might be referred for decision to the International Joint Commission on the consent of both parties (Art. X).

The contention that this Boundary Waters Treaty sanctions a large Chicago diversion and justifies the passage of legislation authorizing a diversion of 10,000 c.f.s. is wholly without merit. The statement of the then Secretary of State, Honorable Elihu Root, before the Foreign Relations Committee of the Senate when this treaty was under consideration, shows that it was not intended to cover Lake Michigan as a boundary water nor to affect the diversion of waters through the Chicago Drainage Canal. Among other things, Secretary Root said to the committee:

> "The treaty starts with defining the boundary waters as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways.

"I have carefully guarded the terms of this treaty in order not to include Lake Michigan and in order not to involve Senator Cullom's constituents in the drainage canal in the treaty in any way.

"Then the treaty provides for what is now and what has been for our entire existence as a nation the free navigation by both countries of the boundary waters, with the provision that the same right of navigation shall extend to the waters of Lake Michigan, providing that so long as the present treaty remains in force the same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters and that the same rules and regulations and the same tolls shall apply to both the High Contracting Parties.

* * *

"The great bulk of the water goes on the Canadian side, and the Waterways Commission that was appointed some time ago to deal with the question of the Lake levels reports, I think, that 36,000 feet can be taken out on the Canadian side and 18,500 on the American side, without injury to the Falls. I thought it wise to follow the report of the Commission and I put in 1500 feet in addition to get round numbers, so our limit is higher than we want but their limit could not be cut down below what it is because there are three companies on the Canadian side who have the right and works there. * * * Then there is this further fact why we could not object to this 36,000 provision on the Canadian side. We are now taking 10,000 cubic feet a second out of Lake Michigan at Chicago, and I refused to permit them to say anything in the treaty about it.

* * *

"The definition of boundary waters was carefully drawn in order to exclude Lake Michigan. * * *

"* * * In the third place" (referring to the reasons for allowing the United States to divert but 20,000 c.f.s. while Canada was allowed 36,000 c.f.s.) "they consented to leave out of this treaty any reference to the drainage canal and we are now taking 10,000 cubic feet per second for the drainage canal which really comes out of this lake system."

The Boundary Waters Treaty and its application to the Chicago diversion came to the attention of the United States Supreme Court in the suit filed by the Federal Government against the Sanitary District of Chicago wherein the United States sought to enjoin the diversion of waters of Lake Michigan in excess of 4167 cubic second feet authorized by the permit of the Secretary of War.[98] The Court, in affirming the decree of the District Court which granted an injunction, held that the Federal Government had a standing in the suit to carry out treaty obligations to a foreign power bordering on

[98] Sanitary District of Chicago v. United States, 266 U.S. 405 (1925).

some of the Great Lakes. The Court in touching upon this subject said in part:[97]

> "With regard to the second ground, the treaty of January 11, 1909 (36 Stat. L.2448) with Great Britain, expressly provides against uses 'affecting the natural level or flow of boundary waters' without authority of the United States or the Dominion of Canada within their respective jurisdictions and the approval of the International Joint Commission agreed upon therein."

A careful reading of this case discloses that the Supreme Court was clearly of the opinion that the Chicago diversion was contrary to the boundary waters treaty of 1909 because such diversion had not been approved in accordance with the terms of such treaty.

The construction placed by the Supreme Court upon this treaty is in accordance with the interpretation placed thereon by the United States War Department, the administrative body entrusted with the enforcement and application of laws relating to navigable waters of the United States, by the Legislative Assembly of the Province of Ontario, Canada, and by the Minister of the Interior of Canada.

Secretary of War, Henry L. Stimson, in his opinion of 1913, denying the application of the Sanitary District of Chicago for a permit to divert 10,000 cubic second feet of water in Chicago, stated that the boundary waters treaty of 1909 did not sanction the Chicago diversion, and that such question should, in accordance with the terms of the treaty, be placed before the International Joint Commission.

In a resolution adopted by the Legislative Assembly of the Province of Ontario, Canada, in the year 1924 protesting agianst the Chicago diversion it was stated, in part, that "such diversion and abstraction is contrary to the International Treaty respecting boundary waters entered into between Canada and the United States, and the Canadian Government has been protesting and is protesting against such diversion for some time past to the Government of the United States."

In 1926, Honorable Charles Stewart, then Minister of the Interior, in a statement made in the House of Commons, declared that the Canadian Government had never recognized the Chicago diversion and promised that it would "continue to protest against the entire principle of abstracting water from the Great Lakes to another watershed."

It is submitted that this uniform interpretation of the Boundary Waters Treaty by the several branches of the two governments con-

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[97] 266 U.S. 405 at p. 426 (1925).

cerned is conclusive as to its true meaning and intent, namely that the Chicago diversion is contrary to and amounts to a violation of this Treaty.[98]

However, further examination into the Treaty and the circumstances surrounding its signing and ratification may be warranted.

The chief purpose of this treaty was stated to be the prevention of "disputes regarding the use of boundary waters." The treaty provided that the United States might authorize the diversion, within the State of New York, of the Niagara River above the falls, for power purposes, not exceeding in the aggregate a daily diversion at the rate of 20,000 c.f.c., and that the United Kingdom, by the Dominion of Canada, or the Province of Ontario, might authorize a diversion of said waters, for power purposes, not exceeding a daily diversion at the rate of 36,000 c.f.s. (Art. V).

With reference to the use of boundary waters, it was provided in the treaty that the following order of precedence should be observed among the various uses enumerated in the treaty for these waters, to wit: uses for domestic and sanitary purposes; uses for navigation; and uses for power and irrigation purposes. These provisions were not to "apply to or disturb any existing uses of boundary water on either side of the boundary (Art. VIII)."

When this treaty was under consideration, it was not intended to cover Lake Michigan as a boundary water. The true facts in regard to the circumstances surrounding and leading to the signing of this treaty with reference to the then existing diversion of waters at Chicago, and the reasons for the apportionment of the waters of the Niagara River, are as follows:

(1) In considering the amount of water of the Niagara River to be allotted to Canada and to the United States, the Joint Committee decided that it would not disturb any works which were then in process of construction and completion, and for which moneys had already been expended.

(2) It appeared that a large part of the hydro-electric power which was to be generated on the Canadian side was under contract for use in the United States and this fact was given recognition in the allotment of water to the two countries.

(3) Most of the water in question, and subject to allotment, was on the Canadian side, and not on the American side.

(4) The amount of diversion at Chicago authorized under the temporary permits of the Secretaries of War from the year 1905 to 1910 was 4167 cubic second feet and, in fact, the diversion through

[98] Sanitary District v. United States, 266 U.S. 405 at p. 426 (1925).

the Chicago Sanitary Canal for the period 1905 through 1909 averaged a little more than 5,000 cubic second feet. The United States never authorized a diversion of 10,000 cubic second feet, and in 1908 the Federal Government filed a suit to enjoin the diversion of more than 4167 cubic feet from Lake Michigan. A second bill was filed in 1913 and the United States was ultimately successful.[99]

The foregoing clearly refutes the claim that a diversion of 10,000 cubic feet per second of water from Lake Michigan was sanctioned by Canada and the United States by the signing of the Treaty in question.

(i) *Other constitutional questions involved in the Chicago Water Diversion litigation.*

In addition to the legal problems considered heretofore, several interesting constitutional issues, (in addition to the question ocncerning the power of Congress to transfer water from one watershed to another which will be discussed in section (j) hereinafter) were raised in the Chicago Diversion cases. An analysis and discussion of these problems will be of interest to lawyers and students of constitutional law, as well as to those interested in the Chicago Diversion problem.

1. *Whether the diversion constitutes a preference to the ports of the State of Illinois over those of the other lake states in violation of Article I, Section 9, Clause 6 of the United States Constitution.*

One of the novel issues raised in this litigation was the contention that the diversion of large quantities of water from the Great Lakes-St. Lawrence system constituted a preference to the ports of the State of Illinois over the ports of the complaining Great Lakes States.

Art. I, Sec. 9, Clause 6 of the United States Constitution provides:

> "No preference shall be given by any Regulation of Commerce or Revenue, to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties to another."

The effect of this provision of the Constitution was considered in *Pennsylvania v. Wheeling Bridge Co.*[100] The effect of this provision was again raised in *South Carolina v. Georgia,*[101] where the court in commenting upon the construction placed upon this provision in the *Wheeling Bridge Company* case, *supra,* said:

> "It was there said that the prohibition of such a preference does not extend to acts which may directly benefit the ports

[99] Sanitary District v. United States, 266 U.S. 405 (1925).
[100] 18 How. 421 (1856).
[101] 93 U.S. 4, 13 (1876).

> of one State, and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce."

In the *Wheeling Bridge* case, *supra,* is was held that the fact that Congress had authorized the construction of a bridge over the Ohio River at Wheeling which incidentally might to some extent hurt navigation to the ports of Pittsburgh in Pennsylvania did not violate this provision. In *South Carolina v. Georgia, supra,* it was held that the act of the federal government, in closing one of two channels in the Savannah River where that river was divided by an island, did not come within this prohibition. The reason for such a holding was that where Congress, in the exercise of a lawful power, made an inmprovement at a port in one state which might incidentally affect the ports of another state, such incidental affect could not be construed to invalidate the exercise of power. That is, Congress may, for instance, improve the harbors of the ports of one state. Such improvement may incidentally tend to give such harbors a preference over those of another state by reason of the fact that such imrovements will make such harbors more attratcive to commerce. However, such an incidental result cannot interfere with such a valid congressional act. It is analogous to the rule that although Congress cannot arbitrarily injure riparian rights under the guise of improving navigation, any injury which is done to riparian rights n the lawful improvement of the navigation along the watercourse is *damnum absque injuria.* In short, the acts which do not come within this prohibition are those which are performed at the particular port or ports of a state, without any direct relation to the ports of other states, and where the results to the ports of other states can only be consequential and indirect. However, where the act of Congress directly gives a preference to the ports of one state over those of another, it is within the constitutional prohibition of Art. I, Sec. 9, Clause 6.

The lake states contended as follows: Were Congress to attempt to authorize the taking or attempt directly to take the waters of the Great Lakes away from the ports of the complaining states and give such waters to the ports of Illinois, it would be an act directly and positively giving a preference to the ports of Illinois over the ports of the complaining states. If Congress attempted to take all of the water of the Great Lakes by draining them, and give such waters to the ports of the state of Illinois for navigation purposes in either natural or artificial channels, such act would constitute a direct and positive preference of the ports of that state over the ports of the complaining states. If a lesser amount of water is taken away from the lakes, and consequently from the ports of the complaining

states, to give to the ports of Illinois for an artificial waterway, the preference can be nonetheless a preference though less in degree. The constitutional provision recognizes no degrees, perhaps for the well-known reason that a very small commercial advantage is sufficient to enable one port to ruin another. The constitutional prohibition does not say that Congress can give the ports of one state a little preference, or a medium preference, but that it can give them no preference.

The Special Master, in considering this point, referred to the *Wheeling Bridge* case[102] and then said:[103]

> "It was contended in that case that the Act of Congress declaring the bridge at Wheeling across the Ohio River to be a lawful structure gave a preference to that port over Pittsburgh, that the vessels to and from Pittsburgh navigating the Ohio and Mississippi Rivers were not only subject to delay and expense in the course of the voyage, but that the obstruction would necessarily have the effect of stopping the trade and business at Wheeling or to divert them in some other direction or channel of commerce. 'Conceding all this to be true' said the Court (id. p. 433), 'a majority of the courts are of the opinion that the act of Congress is not inconsistent with the clause of the constitution referred to — in other words, that is not giving a preference to the ports of one State over those of another, within the true meaning of that provision. There are many acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce, may be referred to as examples. It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld, if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. The consequences and incidents are very proper considerations to be urged upon Congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it.' (id., pp. 433, 444).
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> "The same point was raised in *South Carolina v. Georgia,* 93 U. S. 4. South Carolina insisted that the atcion of the Secretary of War in closing the channel of the Savannah River on the South Carolina side of Hutchinson's Island gave an un-

[102] Pennsylvania v. Wheeling Bridge Co., 18 How. 421 (1856).
[103] Report of Special Master Hughes, filed Nov., 1927, pp. 159-160.

constitutional preference to the ports of Georgia. The Court dismissed the contention, adopting the view expressed in the Wheeling Bridge case. I am of the opinion that the diversion in the present case, if otherwise lawfully authorized, cannot be regarded as beyond the power of Congress, as an unconstitutional preference of ports."

The United States Supreme Court, however, did not rule specifically on this constitutional issue inasmuch as that Court held the diversion unlawful on other grounds. The two opposing theories concerning the proper application of Act. I, sec. 9, Clause 6, of the United States Constitution to the facts involved in the Chicago Diversion litigation are of interest because of the few decided cases construing that constitutional provision.

2. *Whether the diversion constituted a taking of the property of the complainant states in violation of the Fifth and Fourteenth Amendments to the United States Constitution.*

The states of Wisconsin, Michigan, Minnesota, Ohio, New York and Pennsylvania, in their bills of complaint, sought no money damages from the state of Illinois or the Sanitary District of Chicago for losses suffered by the lake states and their peoples due to the artificial lowering of the levels of the Great Lakes by reason of the Chicago diversion. The relief demanded was an injunction. Nevertheless, it was contended by complainants that the diversion of the Waters of Lake Michigan through the Chicago Drainage Canal with the resultant lowering of the levels of all the Great Lakes (except Lake Superior) constituted a taking of the property of the complainant states without due process or just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. If the lake states were right in believing that action of Illinois and the Sanitary District violated the Fifth and Fourteenth Amendments to the Federal Constitution, it is manifest that the court would issue an injunction to enjoin the unlawful diversion even though the exact amount of damages were not shown or not claimed, if substantial damages were proven.

The Fifth Amendment to the Constitution of the United States provides:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the Constitution provides:

"Nor shall any state deprive any person of life, liberty or property without due process of law."

It is an established rule of international law, which the United States recognizes, that independent sovereign states own all of the public domain within their respective boundaries, including all land and water areas within their territorial confines, even though the land therein may be in private ownership.[104]

As one eminent authority[105] points out:

> "A state as a corporate person may possess property, movable and immovable, either within its own limits or beyond them. The territorial property of a state consists of all the land and water within its geographical boundaries, including all rivers, lakes, bays, gulfs and straits lying wholly within them. As incidents to such territorial possessions must be added a state's jurisdiction over marginal waters when its territory abuts upon the sea, and the right of its people to navigate such rivers as form boundaries between two or more states, or such as rising within one state traverse the territories of others on their way to the sea."

When the United States of America became free, independent, and sovereign upon conclusion of the Revolutionary War, Great Britain surrendered to the United States all of her proprietary and territorial rights in and to all of the land and water within the recognized external boundaries of the United States.[106] In the leading case of *Martin v. Waddell,*[107] the United States Supreme Court, in an opinion written by Mr. Chief Justice Taney, said:

> "When the Revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

Then, upon admission to the Union of the states of Wisconsin, Michigan, New York, Ohio, Pennsylvania and Minnesota, each state became a constituent member of the United States and was admitted into the union upon an equal footing with the original thirteen states in all respects.[108] As such state, Wisconsin, Ohio, Michigan and others

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[104] Taylor, International Law, Chap. III, p. 263; 1 Cooley, Constitutional Limitations, 8th ed. p. 4; Hall, International Law, 5th ed. Chap. II, p. 100; 1 Halleck, International Law, Chap. VI, p. 13; Am. & Eng. Ency. of Law, 2d. ed., vol. 16, p. 1133; Wheaton, International Law, Chap. IV, p. 217; Hyde, International Law, vol. I, p. 272; Oppenheim International Law, 3rd ed., par. 172; Glenn, International Law, Par. 34, p. 35; Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

[105] Taylor, International Law, Chap. III, p. 263.

[106] Manchester v. Massachusetts, 139 U. S. 266 (1891).

[107] 16 Peters (U.S.) 367 (1842). Accord: Shively v. Bowlby, 152 U.S. 1 (1894); Weber v. State Harbor Comrs., 18 Wall. 57 (1873); Port of Seattle v. Oregon & Wash. R.R. Co., 255 U.S. 56 (1921).

[108] Pollard v. Hagan, 44 U.S. 212 (1845); Munn v. Illinois, 94 U.S. 113 (1877).

possessed all of the sovereign, proprietary and territorial rights which had been held and exercised by any of the original states, or by any of the states carved out of the Northwest Territory.[109] The complainant states being possessed of all the rights and powers, which before their separation from Great Britain had been exercised by the King and Parliament of England, have complete control over the persons and property within their jurisdiction, subject only to such powers granted to the United States and the powers they are forbidden to exercise by the Constitution of the United States.[110] It is settled law in this country that lands beneath navigable waters within a state belong to the state in its sovereign capacity.[111] The complainant lake states, as sovereign proprietors of all of the public domain within the territorial boundaries of the respective states, have a right to have the waters of the Great Lakes and their connecting waters maintained at their normal and natural level. This is a right of property of which such states may not be dispossessed under the Federal Constitution, except by due process of law. Such a right is subject only to a paramount servitude in favor of Congress to utilize and improve such waters for the purpose of navigation.[112]

It follows that the artificial lowering by the state of Illinois and the Sanitary District of Chicago of the levels of the Great Lakes (except Lake Superior) and the connecting waters between the Great Lakes, constitutes a taking of property of the riparian proprietors (the lake states) thereon within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.[113]

The constitutional rights of the lake states in this regard are firmly established and neither the Congress of the United States under the Commerce Clause of the Federal Constitution nor the state of Illinois under its police power has any power or authority to injure, impair or destroy the property rights of the lake states or of their citizens and any such action would constitute a violation of the plain provisions of the Fifth and Fourteenth Amendments to the United States Constitution.[114]

Manifestly, had the complainant lake states sought money damages from the defendants, the court could, and properly should, have

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[109] Art. V, Ordinance of 1787.
[110] Nichols, Eminent Domain, Par. 7.
[111] United States v. Holt State Bank, 270 U.S. 49 (1926); Appleby v. New York, 271 U.S. 365 (1926); Scott v. Lattig, *et al*, 227 U.S. 229 (1913).
[112] Wisconsin v. Illinois, 278 U.S. 367 (1929); United States v. Rouge River Imp. Co., 269 U. S. 411 (1926); Yates v. Milwaukee, 10 Wall. 497 (1871).
[113] Lewis, Eminent Domain, 3rd ed., vol. I, par. 65; Nichols, Eminent Domain, Par. 28; United States v. Rouge River Imp. Co. 269 U.S. 411 (1926).
[114] Cohen v. United States, 162 Fed. 364 (1908); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Muggler v. Kansas, 123 U.S. 623 (1887); Archer v. United States, 47 Ct. Cl. 248 (1912); Hayward v. United States, 46 Ct. Cl. 484 (1911).

allowed all provable damages. Having waived their claims for money damages but having shown vast substantial and continuing damages, the complainant lake states were properly entitled to the injunction relief granted by the court.

3. *The Chicago diversion as a violation of the Ordinance of 1787, which forbids the obstruction or impairment of the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same.*

The Ordinance for the Government of the Northwest Territory of July 13, 1787 provides, in part, that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free. This provision is still in full force and effect. It has been uniformly held that the provisions of the Ordinance of 1787 established a rule of navigability of navigable waters separate and distinct from the rule applicable at common law.[115] The above principle which was established by that Ordinance was reiterated in later Acts of Congress and accepted by the State of Illinois at the time of her admission into the Union as a state. It is clear that the Ordinance of 1787 forbids the obstruction of these waters by the State of Illinois within the boundaries of the complainant states.

If the waters referred to in the Ordinance of 1787 are to remain common highways, then they cannot be destroyed nor their navigability substantially impaired. And, insofar as the Ordinance of 1787 established common highways in navigable waters capable of bearing commerce from state to state, it is no more subject to repeal by a state than any other regulation of interstate commerce enacted by Congress. The United States Supreme Court has adhered firmly to this policy of preserving the navigable waters in the states carved out of the Northwest Territory.[116]

(j) *Power of Congress to authorize the abstraction of the waters of the Great Lakes to another watershed.*

The one truly important legal problem remaining undecided concerns the power or lack of power of Congress to authorize a diversion of the waters of the Great Lakes to the Mississippi watershed. The lake states contend Congress has no such power. Illinois contends otherwise.

The waters of the Great Lakes and their connecting waters, together with the submerged lands thereunder, are the property of the

[115] Huse v. Glover, 119 U.S. 543 (1886); Economy Light & Power Co. v. United States, 256 U.S. (1921).

[116] Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); *In re* Crawford County L. & D. District, 182 Wis. 402 (1924).

littoral states, and their title thereto, regardless of whether it be the full legal title or in trust for their people, is subject only to the paramount right of Congress to regulate navigation as a power implied from the express power to regulate commerce. Since the rights of these states in such waters and submerged lands are proprietary rights, the control of these states thereover must be final and conclusive except in so far as that title is qualified by the legitimate scope of the federal power to regulate navigation.[117]

The power of the United States over navigable streams is implied from its power to regulate interstate commerce.[118] This implied power over navigable waters is limited to their preservation and improvement as avenues of interstate commerce. The right and duty of the United States in relation to navigable waters is a public trust for their preservation and improvement as interstate highways. The power thus granted to Congress by the Commerce Clause does not authorize it to regulate in order to create something else which it prefers to regulate or to attempt to improve the health of the people of a particular locality.[119]

When the United States was settled, the colonists brought to this country the common law of England. That common law prevailed in full force and effect at the time of the adoption of the constitution. The existence of that common law was taken for granted by the framers of the constitution, and the constitution was adopted and must be construed in relation to the rights, privileges and limitations which existed by virtue of the common law, and upon which common law rights the constitution, upon its adoption, was superimposed. This has many times been recognized by the Supreme Court. In *Kansas v. Colorado*,[120] the court said:

> "It is undoubtedly true that the early settlers brought to this country the common law of England, and that the common law throws light on the meaning and scope of the Constitution of the United States, and is also in many States expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Gray in *United States v. Wong Kim Ark.*, 169 U. S. 649, 654:
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> > " 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd v. United States*,

[117] Illinois Central Railroad Company v. Illinois, 146 U.S. 3387 (1892); Shiveley v. Bowlby, 152 U. S. 1 (1894); Port of Seattle v. Oregon, etc., 255 U. S. 56 (1921).
[118] Gibbons v. Ogden, 9 Wheat 1 (1824).
[119] Wisconsin v. Illinois, 278 U. S. 367 (1929).
[120] 206 U. S. 46 (1907), at pp. 94-95.

> 116 U. S. 616, 624, 625; *Smith v. Alabama,* 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law, I Kent. Com. 336; Bradley, J., in *Moore v. United States,* 91 U. S. 270, 274.'"

When the constitution was adopted, and the express power given to Congress to regulate commerce, the right to abstract the waters of a watershed had never been claimed and much less recognized. This fact is readily determined by any study of the common law in England as it existed at the time when the constitution was adopted, or since that time.[121] The power granted to Congress under the Commerce Clause was merely the power to appropriate all the waters of a navigable waterway for an avenue of commerce along such natural highway including the natural extensions thereof, together with the right to improve that natural highway in its natural basin without regard to any incidental injury therefrom; but there was never included within the grant of power the right to destroy the natural navigable waters for the purpose of attempting to improve the health, the sanitation facilities, the disposal of sewage, or the development of power of a particular community. The states which border on the Great Lakes were settled because of the existence of these resources, and the states themselves then enlarged and enhanced the gifts of nature within their boundaries. Citizens of these states settled and established themselves within their borders because the natural resources contained therein appealed to them.

It is not too much to say that the whole industrial and commercial structure of the United States has been built about the existence of two great waterways separated by the Continental Divide, opening interstate and international communication by the St. Lawrence on the one hand and the Mississippi on the other. Each has its natural advantages. In the basin of each of these waterways, vast populations have built up their social and industrial institutions to use to the maximum these natural advantages. An intense but constitutionally restrained rivalry exists between the two sections and the dominant character of their respective civilizations has been determined, throughout the past one hundred years, as much by their respective advantages as by their common advantages. That the natural advantages of the Great Lakes region should now be sacrificed to the alleged sanitation or power needs of Chicago or to the improvement in the navigable depths of the Mississippi or to an attempt to ameliorate a simulated or grossly exaggerated health problem, would be at variance with the just expectations of the Great Lakes States and their peoples, who have settled the Great Lakes

[121] Odgers, Common Law of England, Vol. 1, pp. 590-594.

region and built it into an efficient and magnificent industrial empire. To question these just expectations would be grossly inequitable, and as has been observed, there is no express language in the Constitution which requires the implication of any such power.

The citizens of the Great Lakes states settled there because of the existence of certain natural advantages, such as climate, soil, and nearness to a large body of water. Surely neither these settlers nor the framers of the Constitution ever thought for one moment that any of these natural resources might at any time be taken away from those who settled in proximity to them and developed and made use of them, for the benefit of individuals who had chosen to locate in another watershed. The founding fathers never dreamed that one day a power given to Congress by the Constitution only by implication would permit a temporary majority in Congress to take away entirely or impair the natural resources in one state for the benefit of people residing in another. Congress has no more right to take the water which is the property of the complainant states, to their damage, and give it to Illinois or the Sanitary District of Chicago for sanitation or power purposes, than Congress would have to authorize Illinois to appropriate the forests or mineral resources of Wisconsin for the benefit of Illinois or a municipal agency of that state. The theory that Congress has no power to authorize the abstraction of the waters of one watershed to another to the injury of the former does not conflict with nor challenge any of the decisions of the United States Supreme Court with reference to the power of Congress to improve navigable waters of the United States. The constitutional power of Congress over navigable waters extends only to improvement of the navigability of waterways and does not extend to their destruction or serious impairment, nor to the use of Congressional authority over navigable waters for the sanitation or power desires of Illinois or the Sanitary District. Any action by Congress under the Commerce Clause must bear some direct and reasonable relation to the ends of navigation. As the Court pointed out in *Wisconsin v. Illinois*,[122] in speaking of the power of the Secretary of War:

> "The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversion."

While Congress, as the Supreme Court has often said, may adopt any means having a direct relation to the control of navigation, not

[122] 278 U.S. 367 (1929).

otherwise at variance with the Federal Constitution,[123] Congress may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the regulation of navigation.[124] Thus, a diversion of water from Lake Michigan for power or sanitation purposes, even by authority of Congress, would be in violation of the rights of the Lakes States and their peoples. Congress itself would have no such power under the Commerce Clause to make a valid grant of authority to Illinois for any inadmissible purposes. In the same way, any action by Congress resulting in the destruction or serious impairment of the navigable capacity of the Great Lakes through diversion of water at Chicago to aid in the enrichment of an artificial channel in another watershed would be unconstitutional and void.

(k) *Discussion of cases sometimes cited as establishing the power of Congress to authorize the abstraction of waters from one watershed to another.*

A review of the cases which have been cited as establishing the power of Congress to authorize the diversion and destruction of the navigable capacity of navigable waters of the United States is in order. Plainly they do not sustain, but refute, such contentions as to the power of Congress.

Pennsylvania v. Wheeling Bridge Co.[125] involving nothing more than the exercise of the familiar power of Congress under the Commerce Clause *reasonably* to balance the convenience of two forms of interstate commerce, that is, interstate commerce by railroad and highway over bridges across navigable streams, and interstate commerce by water upon such navigable streams. The case did not involve any power of Congress to destroy the navigable capacity of a navigable stream for any purpose and much less for a purpose unrelated to and not falling within the movement of interstate commerce. The fact that it was held in *Gibbins v. Ogden,*[126] that regulation of navigable waters comes by implication within the Federal power under the Interstate Commerce Clause did not make commerce by water necessarily predominant over every other form and avenue of interstate commerce; that is, it did not mean that interstate commerce by water was entitled to be free of every inconvenience which might be occasioned by the crossing of the navigable waters by interstate commerce by land, even though the resulting burden upon interstate commerce by land would far outweigh any

[123] United States v. Chandler-Dunbar Co., 229 U.S. 53, 62 (1913).
[124] Port of Seattle v. Oregon & Washington R.R., 255 U.S. 56, 63 (1921); United States v. River Rouge Imp. Co. 269 U.S. 411 (1925).
[125] 59 U.S. (18 How.) 421 (1856).
[126] 9 Wheat 1 (1824).

inconvenience which would otherwise result to interstate commerce by water. Every time the Federal Government regulates the height of a bridge and the width of the spans over a navigable stream, it is merely exercising its power reasonably to balance the claims of two forms and methods of interstate commerce; that is, commerce by water and the important interstate commerce which may be moving by motor or train across the river by bridge. The question in each case is to what extent interstate commerce by water shall be burdened (not destroyed) for the benefit of interstate commerce by land and *vice versa*. The power to balance the sometimes conflicting claims of the two forms of interstate commerce does not touch the question of the alleged power to destroy the navigable capacity of a navigable stream by diverting it into another watershed even for another navigation route and much less for a purpose unrelated to interstate commerce.

The Wheeling bridge was a little too low to provide clearance for the stacks of the largest steamers at all stages of water without taking down a length of their stacks, which was not uncommon in that day, when bridge clearances were less adequate than now (see First Wheeling bridge case, *Pennsylvania v. Wheeling Bridge Co.*[127]); and the Congress simply balanced this inconvenience against not only the economic loss but the complete disruption of interstate commerce by land, which would have been involved in a destruction of the bridge. Manifestly, the case lends no support to the claim advanced by the Chicago Sanitary District.

South Carolina v. Georgia[128] in no sense involved a diversion from the watershed of a navigable stream or the destruction of its navigable capacity. It involved the not uncommon situation where a navigable stream separates for a short distance into two channels so that neither channel has the usefulness commensurate with the general navigable capacity of the river; and when an improvement is made, it is necessary to select one channel or the other, just as it is necessary to select some part of the single channel of the stream when it is sought to provide an improved channel. That the case does not support the defendants is plain from the statement of the court at page 11, reading as follows:

> "* * * The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the waterway of one of its channels, and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient — a mode of improvement not uncommon. The two channels are not two

[127] 54 U.S. (13 How.) 518 (1852).
[128] 93 U.S. 4 (1876).

> rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation."

Missouri v. Illinois[129] was a suit to enjoin the State of Illinois and the Sanitary District of Chicago from discharging sewage through an artificial channel into the Illinois River so that the effluent would eventually by carried down the Mississippi River past the city of St. Louis. No question of impairment of navigable capacity by reason of any diversion from the Great Lakes was rasied or considered. Indeed, Missouri could not have raised such a question because the diversion, insofar as it affected Missouri waters at all, was beneficial to navigation by increasing their navigable depths, as Missouri claimed in subsequent litigation when she sought to preserve the diversion. The only point made with reference to the diversion was that since the City of Chicago was not in the natural watershed of the Mississippi River, there was no right to dispose of Chicago's sewage into that watershed and that contention did not depend upon whether the sewage was transported into the Mississippi watershed by other means such as pumping it undiluted over the divide. Manifestly, this presented no question of the power of Congress or of Illinois to divert water from the Great Lakes to the impairment of their navigable capacity. That the question merely involved the right to discharge the sewage into the Mississippi watershed is plain from the language of Mr. Justice Holmes upon which defendants rely, as follows:[130]

> "Some stress was laid on the proposition that Chicago is not on the natural watershed of the Mississippi, because of a rise of a few feet between the Desplaines and the Chicago Rivers. We perceive no reason for a distinction on this ground. The natural features relied upon are of the smallest. And if under any circumstances they could affect the case, it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance not only of its own statutes, but also of the acts of Congress of March 30, 1822, c. 14, 3 Stat. 659, and March 2, 1827, c. 51, 4 Stat. 234, the validity of which is not disputed. *Wisconsin v. Duluth,* 96 U. S. 379. Of course these acts do not grant the right to discharge sewage, but the case stands no differently in point of law from a suit because of the discharge from Peoria into the Illinois, or from any other or all other cities on the banks of the stream."

It is also illuminating to note the following comment by Mr. Justice Holmes in the subsequent case of *Sanitary District v. United States,* to-wit:[131]

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[129] 200 U.S. 496 (1901).
[130] 200 U.S. 496 (1901) at p. 526.
[131] 266 U.S. 405 (1925) at p. 427.

> "The defendant in the first place refers to two acts of Congress: one of March 30, 1822 * * * and another of March 2, 1827 * * * referred to, *whether hastily or not* in *Missouri v. Illinois,* 200 U. S. 496, 526, as an act in pursuance of which Illinois brought Chicago into the Mississippi watershed."

Of course it is a complete answer to the contention based upon *Missouri v. Illinois,*[132] that these identical statutes and that very decision were urged to constitute authority for the diversion in *Wisconsin v. Illinois,*[133] and that an unanimous court, which incuded Mr. Justice Holmes, held that they were no authority whatsoever.

The claim has also been made that *Sanitary District v. United States,*[134] holds that Congress has power to authorize the diversion of water from one watershed to the other notwithstanding the impairment of navigable capacity. Of course, the case presented the exact antithesis of whether Congress could authorize a diversion from a navigable stream to the impairment of its navigable capacity. The only question there was whether, as against a State, Congress could prohibit a diversion from a navigable stream which would impair its navigable capacity. The relief sought was in strict conformity with the trust of Congress to preserve and improve the natural navigable waters entrusted to its care; and the court held that it had that power. The injunction in that case was granted "without prejudice to any permit that may be issued by the Secretary of War *according to law.*" The defendants in *Wisconsin v. Illinois, supra,* contended that that was a recognition both of the power of Congress and of the Administrative Officers to authorize such diversion. But the contention was in vain.

In *Wisconsin v. Illinois*[135] it was vigorously urged upon the court, on the one hand, that Congress was without power to authorize a diversion from the Great Lakes watershed in an amount which would substantially impair the navigable capacity of the Great Lakes System, and on the other hand, that Congress possessed and had exercised such power; but the court found it unnecessary and declined to decide that grave constitutional question. Mr. Chief Justice Taft, speaking for an unanimous court, stated the contentions of the parties and the view that they need not all be decided, in the following language:[136]

> "* * * Defendants assert that such a diversion is the result of Congressional action in the regulation of interstate commerce, that the injury, if any, resulting is *damnum absque injuria* to

[132] 200 U.S. 496 (1901).
[133] 278 U.S. 367 (1929).
[134] 266 U.S. 405 (1925).
[135] 278 U.S. 367 (1929), at p. 410.
[136] 278 U. S. 367, 410 (1929).

the complaining States. Those States reply that the regulation of interstate commerce under the Constitution does not authorize the transfer by Congress of any of the navigable capacity of the Great Lakes System of Waters to the Mississippi basin, that is, from one great watershed to another; second, that the transfer is contrary to the provisions of the Constitution forbidding the preference of the ports of one State over those of another; and third, that the injuries to the complainant States deprive them and their citizens and property owners of property without due process of law and of the natural advantages of their position, contrary to their sovereign rights as members of the Union. If one of these issues is decided in favor of the complaining States, it ends the case in their favor and the diversion must be enjoined. But in the view which we take respecting what actually has been done by Congress some of these objections need not be considered or passed upon.

"The complainants, even apart from their constitutional objections, contend that Congress has not by statute or otherwise authorized the Lake Michigan diversion, that it is, therefore, illegal and that the injuries by it to the complainant States and their people should be forbidden by decree of this court."

In disposing of the case, Mr. Chief Justice Taft said:[137]

"The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversion."

And again:[138]

"* * * Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. He could not make mere local sanitation a basis for a continuing diversion."

* * *

"* * * It may be that some flow from the Lake is necessary to keep up navigation in the Chicago River, which really is part of the Port of Chicago, but that amount is negligible as compared with 8,500 second feet now being diverted. Hence, beyond that negligible quantity, the validity of the Secretary's permit derives its support entirely from a situation produced by the Sanitary District in violation of complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river."

And further:[139]

"* * * And in so far as the prior diversion was not for the purposes of maintaining navigation in the Chicago River, it was without any legal basis, because made for an inad-

[137] Ibid., p. 417.
[138] Ibid., p. 418.
[139] Ibid., p. 420.

> missible purpose. It therefore is the duty of this Court by an appropriate decree to compell the reduction of the diversion to a point where it rests on a legal basis and thus restore the navigable capacity of Lake Michigan to its proper level."

To appreciate the scope of this decision it is necessary to keep in mind that the defendants, the State of Illinois and the Sanitary District of Chicago, and intervening Mississippi Valley States insisted that the diversion was essential to the maintenance and development of the Lakes to Gulf Waterway; that the Panama Canal had seriously injured the industrial welfare and development of the entire Mississippi Valley; that the maintenance and improvement of the Lakes to Gulf Waterway was essential to prevent ruinous injury to the Mississippi Valley; that the navigable depths in the Illinois Waterway, being constructed by the State of Illinois from the end of the Drainage Canal through the Des Plaines River to the Illinois River, depended upon the maintenance of the diversion; that from 1.2 feet to 5 feet of the navigable depths in the Illinois River, a Federal navigation project, was supplied by the diversion; that the diversion enriched navigable depths in the Mississippi River as far as St. Louis, somewhere between 1 and 2 feet; that the Inland Waterways Corporation claimed the diversion was essential to its practical operations on the Mississippi River; and that the Special Master found it was not controverted that the Secretary of War had these considerations before him on the application and hearing which resulted in the issuance of the permit under which the defendants sought to justify the diversion. The reference to the possible necessity for a negligible diversion to preserve navigation in the Chicago River should not be confused with any diversion to create an artificial waterway or to enrich the navigable capacity of another watershed. The Chicago River is part of the Port of Chicago on the Great Lakes, and as such possible negligible diversion was solely for the purpose of preserving the navigable capacity of the Port of Chicago as part of the Great Lakes System and was limited to an amount which would not impair the navigable capacity of the Great Lakes System. In *Wisconsin v. Illinois*[140] the defendants again urged that the diversion had been authorized by the Congress; and the Court, speaking through Mr. Justice Holmes, said at page 197:

> "* * * These requirements as between the parties are the constitutional rights of those states, subject to whatever modification they thereafter may be subjected to by Congress acting within its authority. It will be time enough to consider the scope of that authority when it is exercised."

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[140] Wisconsin et. al. v. Illinois et. al., 281 U.S. 179 (1930).

Here again the Court refused to decide whether such power rested in the Congress.

Wisconsin v. Illinois came before the Supreme Court a third time in 1933.[141] The defendants and also the Mississippi Valley States (which had attempted again to intervene) contended that the Rivers and Harbors Act of July 3, 1930, and the pending Great Lakes-St. Lawrence Waterway Treaty with Canada constituted an assumption of control over the diversion by the Congress and required a modification of the decree. The Court, in pointing out that simliar contentions had been urged by the defendants throughout the litigation, said in part:[142]

> "In this suit, the State of Illinois has defended from the beginning upon the ground that diversion was essential with reference not only to the needs of sanitation but also for a continuous waterway from the Lake to the Gulf. Wisconsin v. Illinois, supra, pp. 388, 396. But the Court found this contention unavailing and that the existing diversion was unlawful."

Again the Court held that the Congress had not attempted to modify the diversion as fixed by the terms of the Supreme Court degree, and found it unnecessary to pass upon the power of Congress to do so.

Arizona v. California,[143] did not involve any question of a diversion which would destroy the navigable capacity of a navigable stream. Under the Western Law of Waters, the right to divert water for irrigation and municipal purposes to another watershed has prevailed ever since the Spanish days. That right is, of course, subject to the limitation that such diversion may not be made to an extent which substantially impairs the navigable capacity of navigable waters.[144] The contentions of Arizona were: first, that the Colorado River was not navigable at all and that hence the Federal Government had no power to engage in the project; and second, that the terms of the Act would prevent Arizona from securing its fair share of the waters of the river for irrigation and municipal purposes. On the facts alleged in the Bill and the facts of which the Court took judicial notice, it appeared that the Colorado River was a navigable water of the United States; that the project would improve its navigable capacity; that the storage waters would largely consist of flood waters otherwise going to waste and would provide a large surplus above that available under natural conditions for irrigation and municipal uses; that nothing in the Act and nothing which had been done under the Act prevented Arizona from exercising its full rights of

[141] 289 U.S. 395 (1933).
[142] 289 U.S. 395, 401 (1933).
[143] 283 U.S. 423 (1931).
[144] United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).

appropriation; and that unless and until there should be an interference or threatened interference with Arizona's rights of appropriation for irrigation and other purposes, there was no cause of action, and the Bill was dismissed without prejudice.

(1) *Comments on the legal questions raised in the Chicago Water Diversion litigation.*

While the legal issues raised and considered in the litigation brought by the Great Lakes States covered a wide field, the exact issue was whether the State of Illinois and the Sanitary District of Chicago, by diverting permanently 8500 cubic feet per second of water from Lake Michigan through the Chicago Drainage Canal under authority of a Permit issued by the Secretary of War under date of March 5, 1925, with the resultant lowering of lake levels, so injured the riparian and other rights of the complainant states bordering on the Great Lakes as "to justify an injunction to stop this diversion and thus restore the normal levels" of such lakes.

In the last analysis, the main defense of Illinois and the Chicago Sanitary District centered about the validity of the Permit issued by the Secretary of War under date of March 3, 1925. The United States Supreme Court held that the Permit of the Secretary of War dated March 3, 1925 was invalid because: "Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. He could not make mere local sanitation a basis for a continuing diversion".[145]

The Court in deciding the rights of the several states involved in the controversy manifestly applied the common law of waters in determining the right and uses which the states bordering upon the Great Lakes may make of the waters of such lakes, particularly in the situation where the appropriation of the water from Lake Michigan involved a permanent loss of such water to the Great Lakes-St. Lawrence watershed. The Court also considered briefly the power and function of the Secretary of War under authority conferred by Congress under the Commerce Clause of the United States Constitution with respect to navigable waters of the United States. The Court found it unnecessary to rule upon many of the interesting and complex constitutional questions raised in this litigation. A final and authoritative determination of the important question relative to the power of Congress to authorize a permanent diversion of large quantities of water from the Great Lakes-St. Lawrence watershed to the Mississippi watershed must await some future decision by the United States Supreme Court.

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[145] Wisconsin et al. v. Illinois et al., 278 U.S. 367, at p. 418 (1929).